89-273

No.

In The
Supreme Court of the United States

October Term, 1989

TERRANCE O. JACKSON
Petitioner,

v.

COUNTY OF WAYNE; WILLIAM LUCAS,
Sheriff; and DETECTIVE FRANK BURTON,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE MICHIGAN COURT OF APPEALS

And APPENDIX

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QUESTION PRESENTED FOR REVIEW

Does the use of deadly force by the Wayne County Deputy Sheriff, acting in accordance with established policy of the Wayne County Sheriff, render the Sheriff and the County liable under 42 U.S.C. § 1983 as a matter of law?

LIST OF PARTIES

The petitioner in this case is Terrance O. Jackson, who was co-plaintiff in the proceedings below. The respondents are the County of Wayne; William Lucas, Sheriff of Wayne County; and Wayne County Deputy Sheriff Frank Burton, who were defendants in the proceedings below.

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Opinions and orders of the Wayne County Circuit Court are not officially reported. The relevant opinion and orders are reproduced in the Appendix beginning at p. 1a.

Per curiam and memorandum opinions of the Michigan Court of Appeals are not reported. The Michigan Court of Appeals opinions and orders are reproduced in the Appendix at pp. 12a, 14a, 16a and 17a.

Orders of the Michigan Supreme Court, acting on motions, are not generally reported. The January 25, 1989 order of the Supreme Court denying application for leave to appeal is reported at *Jackson v. Wayne County*, 423 Mich 854 (1989). All relevant orders are reproduced in the Appendix at pp. 15a, 18a and 19a.

JURISDICTION

The trial court's orders were entered on February 20, 1986. The Michigan Court of Appeals' per curiam opinion on the appeal as of right was entered June 3, 1987. A motion for rehearing was denied by the Michigan Court of Appeals on August 20, 1987. On January 26, 1988, acting on application for leave to appeal, the Michigan Supreme Court, on its own motion, remanded to the Michigan Court of Appeals for reconsideration. On remand the Michigan Court of Appeals declined to change its prior decision and its opinion to that effect was filed April 29, 1988. A subsequent motion for rehearing was denied by the Michigan Court of Appeals by its order dated June 28, 1988. A second application for leave to appeal was denied by the Michigan Supreme Court on January 25, 1989, and a motion for reconsideration of that order was denied by the Michigan Supreme Court on April 25, 1989.

This petition is filed within 90 days of the final Michigan Supreme Court order of April 25, 1989.

This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1257(a).

STATUTE INVOLVED

This case involves 42 U.S.C. § 1983, which provides in relevant part:

> Every person who, under color of any statute, ordinance, regulation, custom or usage, of any State or Territory or the District of Columbia, subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action of law, suit in equity, or other proper proceeding for redress.

STATEMENT OF THE CASE

Petitioner, a 17-year-old boy, was shot and severely wounded, to the extent of partial paralysis, when he attempted to escape from police custody on September 3, 1980 after his preliminary examination was waived and a $5,000 bond set on the non-violent felony change of unlawfully driving away an automobile (UDAA). Petitioner, who could not pay the bond and was being escorted unhandcuffed to the Wayne County jail, was shot by respondent Deputy Frank Burton while, the parties agree, Burton was acting pursuant to the Wayne County Sheriff's policy regarding the use of deadly force.

In the proceedings below, cross-motions for summary judgment[1] on the matter of liability were presented to the trial court based on the parties' Stipulation of Facts, which is fully reproduced in the Appendix, beginning at p. 20a. So as not to color the facts, no further factual recitation will be made here and the Court is respectfully directed to the Appendix.

The sole record on appeal consisted of the Stipulation of Facts, the Complaint, and respondents' Answers to the Complaint. In the Complaint, petitioner alleged, *inter alia*, counts of violation of civil rights under 42 U.S.C. § 1983 as to respondents Wayne County, Wayne County Sheriff William Lucas and Sheriff's Detective Frank Burton.[2]

The trial court ruled that respondents acted within constitutional guidelines set forth by this Court with regard to

[1] Michigan Court Rule 2.116 denominates this type of motion as one for "summary disposition", though MCR 2.116(C)(8) and (C)(10) track the language of F.R.C.P. 12(b)(6) (failure to state a claim upon which relief can be granted) and Rule 56 (no genuine issue as to any material fact and moving party entitled to judgment as a matter of law) motions for "summary judgment."

[2] The operative First Amended Complaint deleted the Wayne County Sheriff's Department as a defendant, and additionally alleged intentional infliction of mental distress on behalf of respondent's mother, Shirley Jackson Davis, against the Wayne County General Hospital. Mrs. Jackson Davis and the Hospital are not parties to this proceeding.

the use of deadly force in apprehending petitioner, who was attempting to flee from police custody (Opinion of the Court, January 13, 1986, Appendix 7a–8a), and entered orders denying petitioner's motion and granting respondents' motions for summary judgment.

Petitioner appealed by right to the Michigan Court of Appeals which held, in its unpublished per curiam opinion (Appendix 12a), petitioner's claims of error to be without merit. The Court of Appeals did not consider the issue of the liability of the County of Wayne or the Sheriff. Petitioner's subsequent motion for rehearing was denied by the Court of Appeals.

Petitioner applied for leave to appeal to the Michigan Supreme Court, which remanded to the Michigan Court of Appeals (Order, January 26, 1988, Appendix 15a) for reconsideration in light of *Monell v. New York City Dept. of Social Services*, 436 U.S. 658 (1978), *Owen v. City of Independence*, 445 U.S. 622 (1980), *Oklahoma City v. Tuttle*, 471 U.S. 808 (1985), and *Anderson v. Creighton*, 483 U.S. 635 (1987), on the issue of the liability of governmental entities and high supervisory officials in establishing and maintaining standards and policies resulting in violations of constitutional rights. On remand, the Court of Appeals declined to change its prior holding (Memorandum Opinion, April 29, 1988, Appendix 16a), and denied a motion for rehearing (Order, June 28, 1988, Appendix 17a).

The Michigan Supreme Court denied petitioner's second application for leave to appeal (Order, January 25, 1989, Appendix 18a), and further denied the motion for reconsideration (Order, April 25, 1989, Appendix 19a). This petition follows.

REASONS FOR GRANTING THE WRIT

Certiorari should be granted to review the decisions of the Michigan Court of Appeals because they involve 1) the proper construction of Supreme Court guidelines for the use of deadly force in apprehending a fleeing felon and

2) the liability under 42 U.S.C. § 1983 of local governmental entities and high supervisory officials in implementing and maintaining policies which allow for violation of civil rights of citizens.

I

THE USE OF DEADLY FORCE BY THE WAYNE COUNTY DEPUTY SHERIFF, ACTING IN ACCORDANCE WITH ESTABLISHED POLICY OF THE WAYNE COUNTY SHERIFF, RENDERS RESPONDENTS LIABLE UNDER 42 U.S.C. § 1983 AS A MATTER OF LAW.

In this case petitioner, a 17-year-old boy, was shot and severely wounded, to the extent of partial paralysis, when he attempted to escape from police custody on September 3, 1980 after his preliminary examination was waived and a $5,000 bond set on the non-violent felony change of unlawfully driving away an automobile (UDAA). Petitioner, who could not pay the bond and was being escorted unhandcuffed to the Wayne County jail, was shot by respondent Deputy Frank Burton while, the parties agree, Burton was acting pursuant to the Wayne County Sheriff's policy regarding the use of deadly force.

This State has no statute with respect to the use of force necessary to effect the arrest of a fleeing felon. However, petitioner's flight from custody, had it been successful, would have constituted a misdemeanor under Michigan law, M.C.L.A. § 750.197, M.S.A. § 28.394, and even the common-law rule has never permitted the use of deadly force to apprehend a misdemeanant. Additionally, unlike burglary, the crime of auto theft (UDAA) was never punishable by death under the common law.

In *Tennessee v. Garner*, 471 U.S. 1 (1985), this Court held that the use of deadly force to prevent the escape of a nighttime house burglar from the scene was violative of the United

States Constitution, premised on the fact that the taking of a life to apprehend a person fleeing from a non-violent felony was an unreasonable seizure under the Fourth Amendment. In *Garner*, the police had testified that an order to halt was given and they were not certain that the fleeing felon was armed; nor were the officers aware of the identity of the fleeing felon, who turned out to be a youth of 15 years of age and of slight build.

The Court's opinion also affirmed the opinion of the United States Court of Appeals for the Sixth Circuit in *Garner v. Memphis Police Dept.*, 710 F.2d 240 (6th Cir. 1983), where the individual police officer defendants were held entitled to an immunity defense based on their good faith reliance upon Tennessee law. However, the Memphis Police Department and the State of Tennessee were held absolutely liable for the unconstitutional policy of allowing the use of deadly force in apprehending non-violent felons. In so holding, the Sixth Circuit relied upon the case of *Owen v. City of Independence*, 445 U.S. 622 (1980), which held that governmental units had no good faith immunity for constitutional violations and ~~would~~ be held strictly liable therefor. Consequently, if *Tennessee v. Garner*, *supra*, is deemed applicable to this case, respondent Wayne County would be held liable for the constitutional violation based on the stipulation of fact that respondent Burton was acting in accordance with the policy of the Wayne County Sheriff. Moreover, respondent Lucas, as a high supervisory official, would also be held liable under the same principles. *Monell v. New York City Dept. of Social Services*, 436 U.S. 658 (1978).

The trial court placed chief reliance on the fact that petitioner was attempting to escape from custody in distinguishing the instant case from the facts presented in *Tennessee v. Garner*, *supra* (Appendix, pp. 7a–8a). However, petitioner submits that this case is much more compelling than that presented in *Garner*. The lower court's distinction is one without a difference and has never been accepted by any court. That is, the reasonableness of the use of deadly force

to apprehend someone escaping from police custody is considered identical to a person who is fleeing from a crime and has never been in custody.

Initially, it must be remembered that a seizure for Fourth Amendment purposes may take place without the actual touching of a person. A shout, or show of authority, or anything which restrains the freedom of a person to walk away constitutes a seizure. *See e.g., United States v. Mendenhall*, 446 U.S. 544 (1980); *United States v. Brignoni-Ponce*, 422 U.S. 873 (1975). See, also, *Brower v. County of Inyo*, 490 U.S. ___, 109 S.Ct. 1378, 103 L.Ed.2d 628 (1989). Therefore, it is quite absurd to give greater protection to a person, such as in *Garner*, who never stops to the orders of a police officer than to a person, such as petitioner, who has actually been apprehended by law enforcement personnel. Logically, a person such as petitioner, whose identity is known to the law enforcement personnel, would have much less of a chance to make good an escape and evade future detection.

The respondents and the lower courts attempted to create a justification for the use of deadly force through petitioner's attempted escape from respondent Burton's custody. However, as pointed out above, petitioner would only have been guilty of a misdemeanor by escaping and there is no justification, nor has there ever been under the common law, to shoot anyone for committing a misdemeanor. Thus, the fallacy of respondents' position is revealed. Petitioner was arrested for a non-violent felony (UDAA); he then committed a misdemeanor by attempting to escape from custody at the time of his preliminary examination. The non-violent felony and the misdemeanor do not add up to the justification for the use of deadly force as ruled by the lower courts. The trial court was operating under a misapprehension that petitioner's escape constituted a felony (Appendix, 7a). This misapprehension, as clearly revealed by M.C.L.A. § 750.197, M.S.A. § 28.394, is inaccurate. Ironically, respondent Burton, if his purported testimony as to the dangerousness of petitioner is to be believed, subjected himself to a greater

penalty by not handcuffing petitioner pursuant to M.C.L.A. § 750.189, M.S.A. § 28.386. As opposed to one year in prision and a $500 maximum penalty for petitioner's escape, Detective Burton would have been held to a possible maximum of two years imprisionment and a $1,000 fine.

It is quite apparent that the oft-cited Model Penal Code was instrumental in the holdings of the Sixth Circuit and this Court in *Garner*, *supra*. The Model Penal Code was compiled with commentaries by the American Law Institute, the drafters of the Code. Provision 3.07 of the Model Penal Code bears directly on the issue presented, and subsection 3 of Rule 3.07 bears directly on the question of escape from custody:

> (3) *Use of Force to Prevent Escape from Custody.* The use of force to prevent the escape of an arrested person from custody is justifiable when the force could justifiably have been employed to effect the arrest under which the person is in custody, except that a guard or other person authorized to act as a peace officer is justified in using any force, including deadly force, which he believes to be immediately necessary to prevent the escape of a person from jail, prison, or other institution for the detention of persons charged with or convicted of a crime.

As can be seen, a distinction between an escape from a jail, prison or other institution and an escape by a person arrested and simply in custody is made. This distinction is consistent with the common law and sound policy reasons. In the Model Penal Code and Commentaries (Official Draft and Revised Comments), American Law Institute (1985), it is quite clear that the common law and revised statutes all indicate that a peace officer has no greater privilege to use force to prevent the escape of an arrested person from his custody than he had in effecting the arrest in the first instance. The Model Penal Code commentaries cited the following quote from the Arkansas Supreme Court in *Thomas v. Kinkead*, 55 Ark. 502, 508–509, 18 S.W. 854, 856 (1892):

> It is admitted that an officer cannot lawfully kill one who merely flees to avoid arrest for a misdemeanor,

> although it may appear that he can never be taken otherwise. If he runs, then, before the officer has laid hands upon him with words of arrest, he does so without danger to his life. But if, by surprise or otherwise, he be for a moment sufficiently restrained to constitute an arrest and then "break away," the officer may kill him if he cannot overtake him. Such is the effect of the argument and of the rule in support of which it is made. We can see no principle of reason or justice on which such a distinction can rest, and we therefore hold that the force or violence which an officer may lawfully use to prevent the escape of a person arrested for a misdemeanor is no greater than such as might have been rightfully employed to effect his arrest.

Another tragic irony exists. The trial court relied upon the decision of *Newby v. Serviss*, 590 F.Supp. 600 (W.D. Mich. 1984). But, unlike *Newby*, this case does not involve a prison riot and the shooting of an escapee from a state penitentiary. *Newby* did, however, cite Model Penal Code § 307 (the same provision and subsection which is directly applicable to this case) it in support of its ruling.

As previously indicated, the Model Penal Code's distinction is in effect. Therefore, the lower courts' failure to read or apply the material submitted reveals the utter lack of authority for their position. *Thomas v. Kinkead*, *supra*, and other authority, including Annot., 3 A.L.R. 642, § 1621, p. 293 (1957), states as follows in this regard:

> [An officer] may use force to prevent the escape of a prisoner whom he has arrested, but the degree of force or violence which he may use is not greater than that which he may rightfully apply to effect an arrest.

Similarly, in *United States v. Clark*, 31 F. 710 (6th Cir. 1887), which was favorably cited by *Garner v. Memphis Police Dept.*, 710 F.2d at 246, the prohibition against deadly force for non-violent felons was applied in the context of an escape from a military prison. Likewise, in *Mattis v. Schnarr*, 547

F.2d 1007 (8th Cir. 1976), an actual violent confrontation occurred between a suspect and a police officer at the scene prior to the officer's use of deadly force. In ruling its use unwarranted, the Eighth Circuit looked to the underlying offense for which the arrest was sought.

In fact, a footnote in this Court's seminal decision in *Tennessee v. Garner*, *supra*, 471 U.S., at 10, n. 9, speaks to the anomaly of the type of transformation undertaken by the lower courts in the instant case:

> We note that the usual manner of deterring illegal conduct — through punishment — has been largely ignored in connection with flight from arrest. Arkansas, for example, specifically excepts flight from arrest from the offense of "obstruction of governmental operations." The commentary notes that this "reflects the basic policy judgment that, absent the use of force of violence, a mere attempt to avoid apprehension by a law enforcement officer does not give rise to an independent offense." . . . In the few States that do outlaw flight from an arresting officer, the crime is only a misdemeanor. . . . Even forceful resistance, though generally a separate offense, is classified as a misdemeanor. . . .
>
> This lenient approach does not avoid the anomaly of automatically transforming every fleeing misdemeanant into a fleeing felon — subject, under the common-law rule, to apprehension by deadly force — solely by virtue of his flight. However, it is in real tension with the harsh consequences of flight in cases where deadly force is employed. For example, Tennessee does not outlaw fleeing from arrest. The Memphis City Code does, § 22–34.1 (Supp. 17, 1971) subjecting the offender to a maximum fine of $50, § 1–8 (1967). Thus, Garner's attempted escape subjected him to (a) a $50 fine, and (b) being shot. [Citations omitted.]

The Michigan statute previously cited, M.C.L.A. § 750.197, M.S.A. § 28.394, provides that escape from jail or court while waiting arraignment is a misdemeanor. Therefore, the wise reasoning in note 9 quoted above is directly applicable to our situation. *See, also, Sauls v. Hutto*, 304 F.Supp. 124 (E.D. La. 1969), (same analysis, though person fled and crashed an automobile); *Alaska v. Sundgerd*, 611 P.2d 44 (Alas. 1980) (same analysis, despite existence of specific statute providing for use of deadly force for fleeing suspects). It is therefore apparent that logic, case law and statutory law will not accept the lower courts' distinction as applied in this case.

Respondents also argued, through *ex post facto* reasoning which the lower courts wholeheartedly accepted, that petitioner had previously pled guilty to felonious assault for which he was free on bail. This argument, as well as such creative arguments of respondents below, such as airplane flights being endangered by warning shots, call to mind the analytical reasoning in *Taylor v. Collins*, 574 F.Supp. 1554 (E.D. Mich. 1963), where the court rejected as unsubstantial the claims of dangerousness in ruling in favor of the plaintiff by way of summary judgment. In this case, the respondents' arguments as to how "dangerous" petitioner was are patently false. The petitioner was escorted *without handcuffs*. It was discretionary for police officers to use handcuffs if they felt it necessary. Detective Betty Jo Price, who also accompanied petitioner, did not fire any shots at him during his flight. The District Court had just placed a $5,000 bond on petitioner and was required to assess petitioner's level of dangerousness in setting the bond. M.C.L.A. § 765.6, M.S.A. 28.893. Certainly, a $5,000 evaluation of "dangerousness" does not justify the use of deadly force. However, the fact remains that petitioner, who was only 17 years of age, would have been a free man but for his inability to meet the $5,000 bond. The remote threat of harm does not meet the constitutional standard enunciated in *Garner* to allow the use of deadly force. *See, also, Carter v. Chattanooga*, 803 F.2d 217 (6th Cir. 1986).

What is "dangerous" is respondents' argument. If a person's prior offense could be used to justify the shooting of that person at a later time in connection with an unrelated matter, vigilantes would have a field day. The rule required by this Court in *Garner* to bar the use of deadly force in cimcumstances of this nature would not hamper effective police work. If anything, it would induce police officers to be more cautious in escorting prisoners. Not coincidentally, the same policy has been expressed by Michigan statute, M.C.L.A. § 750.189, M.S.A. § 28.386, which provides for a more severe penalty for an officer who negligently allows a prisoner to escape than for the prisioner himself.

In its January 26, 1988 order of remand (Appendix, p. 15a), the Michigan Supreme Court recognized that the liability of the County of Wayne and its high supervisory official, Sheriff William Lucas, would be assessed on an objective basis. Pursuant to *Owen v. City of Independence*, *supra*, there is no qualified immunity for a governing body within the United States to violate the United States Constitution. The Constitution, as the supreme law of the land, is enforced without qualification or exception as to governmental units and their highest supervisory officials. *Harlow v. Fitzgerald*, 457 U.S. 800 (1982); *Anderson v. Creighton*, 483 U.S. 635 (1987). In this case, the trial court and the Michigan Court of Appeals relied upon the subjective, projected testimony of respondent Burton. However, the sole relevant inquires are: 1) as to the County of Wayne and the Wayne County Sheriff whether the policy of permitting the shooting of a 17-year-old youth fleeing from a UDAA charge was violative of the United States Constitution; and 2) as to Deputy Burton, whether the unconstitutionality of this policy was established on the date of the incident, September 3, 1980. (The parties stipulated that respondent Burton was acting in accordance with established policy. *See*, the parties' Stipulation of Facts, Appendix, p. 21a.) Instead, on remand, the Michigan Court of Appeals stood by its holding, which ignores that last decade of this Court's authority concerning governmental and official immunity.

This Court, since *Monell*, has been attempting to obviate the need to delve into subjective justifications and motivations. Indeed, this past term the Court held, in *Graham v. Connor*, 490 U.S. ___, 109 S.Ct. 1865, 1872, 104 L.Ed.2d 443, 456 (1989), that:

> As in other Fourth Amendment contexts, however, the "reasonableness" inquiry in an excessive force case is an objective one; the question is whether the officers' actions are "objectively reasonable" in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation. See Scott v United States, 436 US 128, 137–139, 56 L Ed 2d 168, 98 S Ct 1717 (1978); see also Terry v Ohio [392 U.S. 1], at 21, 20 L Ed 2d 889, 88 S Ct 1868, 44 Ohio Ops 2d 383 [1968] (in analyzing the reasonableness of a particular search and seizure, "it is imperative that the facts be judged against an objective standard"). An officer's evil intentions will not make a Fourth Amendment violation out of an objectively reasonable use of force; nor will an officer's good intentions make an objectively unreasonable use of force constitutional. . . [Citations omited.]

The lower courts rejected this standard and relied *solely* on respondent Burton's subjective beliefs.

The original decision of the Michigan Court of Appeals, and its "opinion" following remand, are an undisguised attempt to ignore the effect of *Garner*. The only thing apparent regarding the court's thought process is that it disagrees with *Garner*, and its opinion cannot be reconciled with *Monell* or *Owen*.

In conclusion, it is undisputed that there is a grave and legitimate public interest in law enforcement; but balancing society's interest in apprehending criminals and the sacred right to life, the balance would be to use reasonable, non-deadly means to apprehend petitioner, whose identity and address were obviously known to respondents. *See, Tennessee v. Garner, supra; Gilmere v. Atlanta*, 774 F.2d 1495 (11th

Cir. 1985); *Pruitt v. Montgomery*, 771 F.2d 1475 (11th Cir. 1985); *Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971).

RELIEF REQUESTED

Petitioner respectfully requests that this Court grant certiorari to review the judgment of the Michigan Court of Appeals, and hold that petitioner is entitled to judgment as a matter of law.

Respectfully submitted,
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August 14, 1989

APPENDIX TO PETITION FOR CERTIORARI

• • •

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE
COUNTY OF WAYNE

TERRANCE O. JACKSON and SHIRLEY JACKSON DAVIS,
Plaintiffs,

-vs- Case #82-218-687 NZ

COUNTY OF WAYNE, WAYNE COUNTY SHERIFF'S DEPARTMENT, WILLIAM LUCAS, SHERIFF DETECTIVE BURTON and WAYNE COUNTY GENERAL HOSPITAL,
Defendants.

OPINION OF THE COURT

Given by the Honorable Thomas J. Foley, Judge of the Third Judicial Circuit of Michigan, at 1901 City County Bldg., Detroit, Michigan, on Monday, January 13, 1986.

APPEARANCES:

MESSR. FRANK G. BECKER, ESQ., appearing on behalf of the Plaintiffs,

MESSR. DEAN KOULOURAS, ESQ., appearing on behalf of the Defendants.

Nancy L. Prisby, CSR-0095
Official Court Reporter

Detroit, Michigan
Monday, January 13, 1986
At or about 9:14 o'clock a.m.

THE CLERK OF THE COURT: Jackson versus Wayne County Sheriff.

THE COURT: Good morning, gentlemen.

MR. BECKER: Good morning, Your Honor.

MR. KOULOURAS: Good morning, Your Honor.

THE COURT: I didn't realize how many cases you had submitted until I started reading them on Saturday; it took most of the day, but I arrived at my determination of this matter after reading all of your cases, listening to your arguments and reviewing your Briefs.

This matter came before the Court by means of a cross motion for Summary Judgment on the matter of liability only.

The parties have bifurcated the question of liability and damages for the purpose of having the Court determine the question of liability as a matter of law.

The parties have agreed upon a stipulation of facts in which this Court must determine, legally, the issue of liability. The facts reveal that the Plaintiff, Jackson, was shot in the shoulder by the Defendant police officer while attempting to flee from custody. Plaintiff was being conveyed from his examination on an Unlawfully Driving Away An Auto, felony charge, and Plaintiff had just waived the examination and was being returned to the Wayne County Jail.

Detective Burton, the conveying officer, by virtue of his position with the police department, is also aware that Jackson had previously been in the Northville State Hospital for emotional problems dealing with violent behavior and further was awaiting sentence on September 5, 1980, for Felonious Assault, resulting from an incident wherein Jackson had stabbed his stepfather with a knife. The officer was further aware that the employee of the Seven-Eleven Store, where Jackson stole the automobile, was in fear of him returning and either threatening or injuring her.

Plaintiff was attempting to flee into a corn field where the corn was approximately the same height as the Plaintiff.

Mr. Jackson thought the officer would not shoot and that he, Mr. Jackson, could out run the officer.

Although the Plaintiff alleged he did not hear the warning shouts of the officer, it is uncontested that Officer Burton shouted warnings to Plaintiff prior to the shots being fired.

Now when the officer fired his gun, he was aware that he was using deadly force; that it was his understanding he was following the Rules and Regulations of the Wayne County Sheriff's Department and the Laws of the State of Michigan.

Plaintiffs agree that Detective Burton was reacting to the policies of the Sheriff's Department.

Detective Burton estimated Plaintiff was approximately 120 feet away when he fired his pistol and he had chased him approximately 40 to 50 feet. He did not feel he could catch the Plaintiff and that he would escape.

Detective Burton was aware that beyond the corn field into which the Plaintiff was fleeing, there were homes and farms in a rural surrounding and motorists with whom the Plaintiff might seek a ride.

Further, Detective Burton knew Plaintiff was a fleeing felon and posed a danger to people in the community.

Other stipulated facts will be referred to as we go along. Regarding the liability of Detective Burton, the parties agree Common Law Rule regarding use of force in the apprehension of fleeing felons prevails in the State of Michigan.

Common Law provides, in substance, that the deadly force could be used by a police officer if necessary to apprehend a suspected flecing felon. This is *Werner v Hartfelder*, 113 Michigan App. 747, 1982 case.

Thus, based upon the stipulated facts that Detective Burton acted in good faith reliance upon the Laws of the State of Michigan, acted with the understanding he was following the Rules and Regulations of the Wayne County Sheriff's

Department and in agreement of the parties, Detective Burton complied with the policies of the Sheriff. This Court holds that Detective Burton acted in good faith reliance on the Laws of the State of Michigan, Rules and Regulations of his department and was therefore within the scope of his qualified immunity and is entitled to Summary Judgment by dismissal.

The remaining questions deal with an allegation of the violation of the provision of 42 USC Section 1983. The parties agree that the constitutionality of Detective Burton's actions in the light of *Tennessee v Garner, et al*, 105 S. Ct. 1694, 1985 case, and other supporting cases submitted, controls the outcome of the granting of the Summary Judgment.

If the actions of Detective Burton were proper, within the constitutional dictates of *Tennessee v Garner*, then Defendants are entitled to a Summary Judgment, otherwise not.

Tennessee v Garner, et al Supra, The Supreme Court of the United States stated in pertinent part:

> "This case requires us to determine the constitutionality of the use of deadly force to prevent the escape of an apparently unarmed suspected felon. We conclude such force may not be used unless it is necessary to prevent the escape and the officer has probable cause to believe the suspect poses a significant threat of death or serious physical injury to the officer or others." And that appeared at page 1697.

After discussing the reasons for the use of deadly force and acknowledging the merits of such reason, the Court went on to state at page 1700:

> "Without in any way disparaging the importance of these goals, we are not convinced the use of deadly force is a sufficiently productive means of accomplishing them to justify the killing of nonviolent suspects.

Now, at page 1701, summarizing the Tennessee Statute, the Court says:

"The use of deadly force to prevent the escape of all felon suspects, whatever the circumstances, is constutitionally unreasonable."

And quote again from the same page:

"The Tennessee Statute is unconstitutional insofar as it authorizes the use of deadly force against such fleeing suspects. It is not, however, unconstitutional on its face where the officer has probable cause to believe that the suspect poses a threat of serious physical harm either to the officer or to others. It is not unconstitutionally unreasonable to prevent escape by use of deadly force. Thus, if the suspect threatens the officer with a weapon or there is probable cause to believe that he has committed a crime involving the infliction of serious physical harm, deadly force may be used if necessary to prevent the escape, and if where feasible, some warning had been given."

Now the Court went on to state at page 1703, that the mere reference to a crime as a felony as distinguished from a misdemeanor and assuming the felony is more serious than the later is untenable. The Court stated:

"Indeed, numerous misdemeanors involve conduct more dangerous than many felonies.

Thus we can see throughout these many quotes constant recognition of the dangerous nature of the fleeing felon as the basis for determining the question regarding the use of force as distinguished from mere technical labels of the crimes committed."

As an example, if one were to commit a larceny and later, while attempting to — upon attempting apprehension, you produce a weapon, the characterization of the crime as a property crime would not be controlling but in fact the dangerous nature of the felony would be the controling factor in the use of force in his capture.

At page 1706, the Court opined:

> "However, the fact that Garner was a suspected burglar could not, without regard to the other circumstances, automatically justify the use of deadly force. Hymon, the police officer in that matter, did not have probable cause to believe that Garner, whom he correctly believed to have been unarmed, posed any physical danger to himself or others."

Now the United States Court of Appeals, Eleventh Circuit in *Pruitt v City of Montgomery Alabama*, et al, 771 F 2d 1474 (1985) summarized the essential elements set forth in *Garner* as follows:

> "The Garner standard contains three elements. First, an officer must have probable cause to believe that the suspect poses a threat of serious physical harm to the officers or to others. Probable cause of this sort exists where the suspect actually threatens the officer with a weapon or where there is probable cause to believe that the suspect has committed a crime involving the infliction or threatened infliction of serious physical harm.
>
> Second, deadly force must be necessary to prevent escape.
>
> Third, the officer must give some warning regarding the possible use of deadly force wherever feasible."

Now the totality of the circumstances rule as recognized as *Garner* requires us to go beyond the narrow concept that at the time of the attempt to escape, the Plaintiff was in custody for the crime of U.D.A.A. We must look to the dangerous nature of the Plaintiff, all of which was fully known to the officer at the time of the escape.

The stipulated facts show a 17 year old who had previously been in Northville State Hospital for emotional problems dealing with violent behavior. The Plaintiff was, at the very time of the escape, awaiting sentence for Felonious

Assault resulting from an incident wherein he stabbed his stepfather with a knife. All of these factors plus the fact that the Plaintiff had, by virtue of his actions, taken the status of a fleeing felon, which is also a felony crime.

Now one must not be insensitive to the fact that a fleeing felon who stands to go to prison on a felony crime of violence, a property theft felony and possible felony escape charge, must be considered a danger to unsuspecting citizens of the community.

As Judge Hillman, who is a District Judge, in the Western District of Michigan, apply stated in *Newby Jr. v Serviss*, found at 590 F Supp 591, 1984 case, wherein a 22 year old male was shot and killed in an escape from the Michigan Training Unit where he was confined for breaking and entering:

> "His potential threat to the safety or perhaps lives of innocent citizens living near the prison or to drivers on the highway adjacent to the prison, is obvious."

This Court finds, based upon the Stipulated Facts which the parties submit as true, one, that the officer had probable cause to believe that the Plaintiff posed a serious threat to others, namely, innocent citizens living in the area of the escape or drivers on nearby highways. The fact that the Plaintiff had been convicted of a crime involving the infliction of serious harm and had been institutionalized for emotional problems regarding violent behavior, without regard to other felonies herein mentioned, more than fulfilled the requirements of *Garner*.

The use of the officer's gun was necessary to prevent the Plaintiff's escape.

And thirdly, it is not contested that the officer gave Plaintiff warning prior to wounding him in the shoulder.

It must be remembered that an escaping felon has no constitutional rights to be free from the use of deadly force

when deadly force is necessary to prevent or terminate his escape and a felon constitutes a danger to the officer or citizens of the community.

Thus the Court holds that Detective Burton's actions clearly fall within the constitutional constraints laid down in *Garner*.

Defendant's Motion For Summary Judgment of Dismissal is granted.

Judgment will be presented within ten days. Based upon that, it is not necessary that the Court certify this question but if you wish for some reason it be certified, I will be glad to do it.

Actually, this is a final Order of the case, certification would not be necessary. I have all of the cases here if you want them back. You may have them.

MR. KOULOURAS: I don't need them, Your Honor. It is kind of a unique situation. You may want to keep them for your file.

MR. BECKER: Your Honor, I would like some of mine back because my xerox copy wasn't as good, but do you have a Second Count as well? Intentional infliction of emotional distress? It is not a final Order until that is decided.

THE COURT: I thought we made a determination on that, that if this fell, that the other —

MR. BECKER: — That would be as to Count I, Assault and Battery. Intentional infliction is to the mother; it has no bearing; it has to be decided as well.

THE COURT: I have examined that and I think I can rule as a matter of law, without any question whatsoever, that this does not, in the State of Michigan, rise — give rise to the Intentional Infliction of Harm as you have requested and alleged. I think the Michigan law is quite clear it must be so shocking that it is so offensive to the sensibility of man and this doesn't in any way even approach that point and I would grant the motion on that Count also.

MR. KOULOURAS: Thank you, Your Honor.

MR. BECKER: Thank you, Your Honor.

(Matter concluded at or about 9:31 o'clock a.m.)

CERTIFICATE OF COURT REPORTER

STATE OF MICHIGAN)
) s.s.
COUNTY OF WAYNE)

I, Nancy L. Prisby, Official Court Reporter, do hereby certify that I reported in stenotype the foregoing matter in open Court in the matter of Jackson v. Wayne County Sheriff Department, et al, Case #82-218-687 NZ, and that the same was thereafter reduced to typewritten form by me and the same is a true and accurate transcription of my said stenotype notes.

/s/ NANCY L. PRISBY

Nancy L. Prisby, Official Court Reporter
CSR-0095

Dated: March 31, 1986

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR
THE COUNTY OF WAYNE

TERRANCE O. JACKSON and
SHIRLEY JACKSON DAVIS,
Plaintiffs,

-vs- C.A. No.: 82 218 687 NZ

COUNTY OF WAYNE, WILLIAM LUCAS,
SHERIFF, DETECTIVE BURTON and
WAYNE COUNTY GENERAL HOSPITAL
Defendants.

ORDER DENYING MOTION OF PLAINTIFFS FOR SUMMARY DISPOSITION

At a session of said Court, held in the City of Detroit, County of Wayne, State of Michigan on: February 20, 1986

PRESENT:
HONORABLE: THOMAS J. FOLEY

The parties having entered into a Stipulation of Facts, and cross motions for summary disposition being argued by the parties, and the Court being fully advised in the premises,

IT IS HEREBY ORDERED that the motion for summary disposition as asserted by the Plaintiff is hereby denied for the reasons stated on the record.

/s/ THOMAS J. FOLEY
Circuit Court Judge

Approved as to form:

/s/ FRANK G. BECKER
Frank G. Becker

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR
THE COUNTY OF WAYNE

TERRANCE O. JACKSON and
SHIRLEY JACKSON DAVIS,
Plaintiffs,

-vs- C.A. No.: 82 218 687 NZ

COUNTY OF WAYNE, WILLIAM LUCAS,
SHERIFF, DETECTIVE BURTON and
WAYNE COUNTY GENERAL HOSPITAL
Defendants.

ORDER GRANTING MOTION OF DEFENDANTS FOR SUMMARY DISPOSITION

At a session of said Court, held in the City of Detroit, County of Wayne, State of Michigan on: February 20, 1986

PRESENT:
HONORABLE: THOMAS J. FOLEY

The parties having entered into a Stipulation of Facts, and cross motions for summary disposition being argued by the parties, and the Court being fully advised in the premises,

IT IS HEREBY ORDERED that the motion for summary disposition as to all Defendants is hereby granted as to all counts, and the Defendants are hereby dismissed from this cause, for the reasons stated on the record, with prejudice and without costs to any party.

/s/ THOMAS J. FOLEY
Circuit Court Judge

Approved as to form:

/s/ FRANK G. BECKER
Frank G. Becker

State of Michigan — Court of Appeals

TERRANCE O. JACKSON and
SHIRLEY JACKSON DAVIS,
Plaintiffs-Appellants,

June 3, 1987

v

No. 90918

COUNTY OF WAYNE, WILLIAM LUCAS,
SHERIFF, DETECTIVE BURTON and
WAYNE COUNTY GENERAL HOSPITAL,
Defendants-Appellees.

BEFORE: J.B. Sullivan, P.J., MacKenzie and R.M. Daniels*, JJ.

PER CURIAM

Plaintiffs appeal as of right from an order of the trial court granting defendants' motions for summary disposition, in part under MCR 2.116(c)(8), for failure to state a claim upon which relief may be granted, and in part under MCR 2.116(c)(10), for want of genuine issue as to any material fact. We affirm.

The stipulated facts reveal that plaintiff, Terrance Jackson ("plaintiff"), after waiving the preliminary exam on a UDAA felony charge and while being returned to the Wayne County Jail, attempted to flee from custody. Plaintiff was chased by defendant, Detective Burton, who ordered plaintiff to stop several times. Burton chased plaintiff for fifty feet and, as plaintiff was entering a corn field, Burton shot him, striking him in the shoulder. Burton estimated that plaintiff was 120 feet in front of him when he fired his pistol, and believed plaintiff would have escaped had he not shot him. Burton knew that plaintiff was also awaiting sentence on a felonious assault conviction, pled down from the charge of assault with attempt to commit murder, which arose after plaintiff stabbed his stepfather with a knife. Burton was also aware that plaintiff had previously been treated in the Northville

* Circuit judge, sitting on the Court of Appeals by assignment.

State Hospital for emotional problems dealing with violent behavior.

We have reviewed plaintiff's allegations of error and find them to be without merit.

Plaintiff first claims that the granting of summary disposition in favor of defendants on the §1983 claims was error because Detective Burton's use of deadly force violated plaintiff's constitutional rights as set forth in *Tennessee* v *Garner*, 471 US 1; 105 S Ct 1694; 85 L Ed 2d 1 (1985). In *Garner*, the Supreme Court concluded that deadly force cannot be used to stop a fleeing felon "unless it is necessary to prevent the escape and the officer has probable cause to believe that the suspect poses a significant threat of death or serious physical injury to the officers or others". 85 L Ed 2d at 4. In a well reasoned and detailed opinion, the trial court found that this standard was satisfied here, and plaintiff has offered nothing to convince us to the contrary. Plaintiff's claim that the officer's action constituted a planned "execution" of a harmless individual is patently absurd.

We likewise agree with the trial court's finding that plaintiff failed to allege conduct that is extreme and outrageous. Summary disposition as to the allegation of intentional infliction of emotional distress was likewise proper.

AFFIRMED.

/s/ Joseph B. Sullivan
/s/ Barbara B. MacKenzie
/s/ R. Max Daniels

AT A SESSION OF THE COURT OF APPEALS OF THE STATE OF MICHIGAN, Held at the Court of Appeals in the City of Detroit, on the thirteenth day of August in the year of our Lord one thousand nine hundred and eighty-seven.

TERRANCE O. JACKSON and
SHIRLEY JACKSON DAVIS,
Plaintiffs-Appellants,

v

COUNTY OF WAYNE, WILLIAM LUCAS, SHERIFF, DETECTIVE BURTON and WAYNE COUNTY GENERAL HOSPITAL
Defendants-Appellees.

Present the Honorable
Joseph B. Sullivan
Presiding Judge
Barbara B. MacKenzie
R. Max Daniels
Judges

Docket No. 90918
L.C. No. 82 218687
NZ

In this cause a motion for rehearing is filed by plaintiffs-appellants, and no answer in opposition thereto having been filed, and due consideration thereof having been had by the Court,

IT IS ORDERED that the motion for rehearing be, and the same is hereby DENIED.

STATE OF MICHIGAN — ss.

I, Ronald L. Dzierbicki, Clerk of the Court of Appeals of the State of Michigan, do hereby certify that the foregoing is a true and correct copy of an order entered in said court in said cause; that I have compared the same with the original, and that it is a true transcript therefrom, and the whole of said original order.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Court of Appeals at Lansing, this 20th day of August in the year of our Lord one thousand nine hundred and eighty-seven.

/s/ RONALD L. DZIERBICKI
Chief Clerk

ORDER

Entered: January 26, 1988

81615

TERRANCE O. JACKSON and
SHIRLEY JACKSON DAVIS,
Plaintiffs-Appellants,

v

COUNTY OF WAYNE, WILLIAM LUCAS, SHERIFF, DETECTIVE BURTON and WAYNE COUNTY GENERAL HOSPITAL,
Defendants-Appellees.

SC: 81615
COA: 90918
LC: 82-218-687-NZ

On order of the Court, the application for leave to appeal is considered and, pursuant to MCR 7.302(F)(1), in lieu of granting leave to appeal, we REMAND the case to the Court of Appeals for reconsideration in light of *Monell* v *Department of Social Services*, 436 US 658, 694-695; 98 S Ct 208; 56 L Ed 2d 611 (1978), *Owen* v *City of Independence*, 445 US 622; 100 S Ct 1398; 63 L Ed 2d 673 (1980); *Oklahoma City* v *Tuttle*, 471 US 808; 105 S Ct 2427; 85 L Ed 2d 791 (1985) and *Anderson* v *Creighton*, _____ US _____; 107 S Ct ____; 97 L Ed 2d 523, 534–535 (1987).

We do not retain jurisdiction.

I, CORBIN R. DAVIS, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of Court.

January 26, 1988

/s/ Corbin R. Davis
Clerk

State of Michigan — Court of Appeals

TERRANCE O. JACKSON and SHIRLEY JACKSON DAVIS,
Plaintiffs-Appellants,

v

Apr 29 1988

No. 106283
(On Remand)

COUNTY OF WAYNE, WILLIAM LUCAS, SHERIFF, DETECTIVE BURTON and WAYNE COUNTY GENERAL HOSPITAL,
Defendants-Appellees.

BEFORE: J.B. Sullivan, P.J., MacKenzie and E.A. Weaver, JJ.

MEMORANDUM

This matter was remanded from the Supreme Court to the Court of Appeals for reconsideration in light of *Monell* v *Department of Social Services*, 436 US 658, 694–695; 98 S Ct 208; 56 L Ed 2d 611 (1978), *Owen* v *City of Independence*, 445 US 622; 100 S Ct 1398; 63 L Ed 2d 673 (1980); *Oklahoma City* v *Tuttle*, 471 US 808; 105 S Ct 2427; 85 L Ed 2d 791 (1985) and *Anderson* v *Creighton*, ___ US ___; 107 S Ct 2427; 97 L Ed 2d 523, 534–535 (1987).

The panel has reviewed those four decisions and does not believe it should change its prior holding.

/s/ Joseph B. Sullivan
/s/ Barbara B. Mackenzie
/s/ Elizabeth A. Weaver

COURT OF APPEALS, STATE OF MICHIGAN
ORDER

Terrance Jackson v
Wayne County Sheriff

Docket #106283

L.C. #82 218687 NZ

Joseph B. Sullivan
Presiding Judge

Barbara B. MacKenzie
Elizabeth A. Weaver
Judges

The Court orders that the motion for rehearing is DENIED.

A true copy entered and certified by Ronald L. Dzierbicki, Chief Clerk, on

June 28, 1988

/s/ Ronald L. Dzierbicki
Chief Clerk

ORDER

Entered: January 25, 1989

83761

TERRANCE O. JACKSON and
SHIRLEY JACKSON DAVIS,
Plaintiffs-Appellants,

v

COUNTY OF WAYNE; WILLIAM LUCAS, SHERIFF, DETECTIVE BURTON; and WAYNE COUNTY GENERAL HOSPITAL,
Defendants-Appellees.

SC: 83761
CoA: 106283
LC: 82-218
687-NZ

On order of the Court, the application for leave to appeal is considered, and it is DENIED, because we are not persuaded that the questions presented should be reviewed by this Court.

Levin, Cavanagh and Archer, JJ., would grant leave to appeal.

I, CORBIN R. DAVIS, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of Court.

January 25, 1989 /s/ Jacqueline B. MacKinnsey

ORDER

Entered: April 25, 1989

83761(25)

TERRANCE O. JACKSON and
SHIRLEY JACKSON DAVIS,
Plaintiffs-Appellants,

v

COUNTY OF WAYNE; WILLIAM LUCAS, SHERIFF, DETECTIVE BURTON; and WAYNE COUNTY GENERAL HOSPITAL,
Defendants-Appellees.

SC: 83761
CoA: 106283
LC: 82-218
687-NZ

On order of the Court, the motion for reconsideration of this Court's order of January 25, 1989, is considered, and it is **DENIED**, because it does not appear that the order was entered erroneously.

Levin J., would grant reconsideration and would grant leave to appeal.

I, CORBIN R. DAVIS, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of Court.

April 25, 1989

/s/ Corbin R. Davis
Clerk

STATE OFMICHIGAN
IN THE CIRCUIT COURT FOR
THE COUNTY OF WAYNE

TERRANCE O. JACKSON and
SHIRLEY JACKSON DAVIS,
Plaintiffs,

-vs- C.A. No.: 82 218 687 NZ

COUNTY OF WAYNE, WILLIAM LUCAS,
SHERIFF; DETECTIVE BURTON and
WAYNE COUNTY GENERAL HOSPITAL,
Defendants,

FRANK G. BECKER (P25502)
Attorney for Plaintiffs
(313) 336-3460

JOHN D. O'HAIR (P18432)
DEAN KOULOURAS (P16176)
Attorneys for Defendants
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Detroit, Michigan 48226
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STIPULATION OF FACTS

The Plaintiff, Terrance Jackson, was born on December 27, 1962. The shooting incident, out of which this action arises, occurred on September 3, 1980. As of the date of the shooting, the Plaintiff was seventeen years of age. On September 3, 1980, the Plaintiff was scheduled to appear at the 34th District Court in Romulus for a preliminary examination. The Plaintiff had been charged with Unlawfully Driving Away an Automobile and had been held at the Wayne County Jail. The Plaintiff was being charged as an adult. On September 3, 1980, at the 34th Judicial District Court in Romulus, the Plaintiff waived his preliminary examination and the District

Court Judge set a cash bond in the amount of Five Thousand ($5,000) Dollars for Terrance Jackson. The Defendant, Detective Burton, a senior detective of the Wayne County Sheriff's Department, was one of the law enforcement personnel who transported the Plaintiff to the 34th District Court. Detective Burton was in charge of the U.D.A.A. case against Terrance Jackson. Following the court appearance, the Plaintiff was escorted from the building by Detective Burton and Betty Jo Price, who also was a detective for the Wayne County Sheriff's Department. At this time, the Plaintiff was not handcuffed. Detective Burton will testify that as Burton, Price and Jackson neared the police vehicle, the Plaintiff pushed Detective Burton and then started to flee from the scene. The Plaintiff will testify that he denies pushing Detective Burton but fled custody. Terrance Jackson ran across the courthouse parking lot toward a corn field in an attempt to escape. The Plaintiff was wearing personal clothes and gym shoes. He was attempting to run into the corn field and then across Wayne Road. The corn, within the field, was approximately the height of the Plaintiff. Terrance Jackson believed that the officers would not shoot him because they were in civilian clothes and he did not see a gun. He thought he could outrun the Wayne County Officers. Plaintiff will testify that he was shot right before he was into the tall stalks of corn. Detective Burton will testify that the Plaintiff was in 6–10 rows of corn when he fired. The Plaintiff testified he did not hear anyone calling for him to halt or stop. Detective Burton testified that he did indicate several times for Terrence Jackson to stop.

When he fired, Burton attempted to strike the Plaintiff. Burton was aware of the fact that he was using deadly force. It was Detective Burton's understanding that he was following the rules and regulations of the Wayne County Sheriff's Department and the law of the State of Michigan. The parties agree that Detective Burton complied with the policies of the Sheriff. Burton estimated the distance between him-

self and Terrance Jackson when he fired his shot at approximately one hundred and twenty (120) feet. After shooting Jackson, the Plaintiff did not move. Burton knew that Plaintiff was unarmed and knew that the Plaintiff was awaiting sentence on September 5, 1980 for felonious assault and had been previously in Northville State Hospital for some emotional problems, dealing with violent behavior. Burton also understood that Plaintiff attempted to flee at the time of his arrest for the criminal charge of U.D.A.A., although no charge was made on the basis of an attempt flight [*sic*] from the scene. The use of handcuffs was discretionary with police officers who transport prisoners. Burton indicated that he chased the Plaintiff approximately forty to fifty (40–50) feet before firing his shot. Burton indicated he did not feel that he could catch the Plaintiff. There were no other shots fired at the Plaintiff other than by Burton.

It is stipulated that Detective Burton would testify that he used deadly force for several reasons: First, he knew the Plaintiff was a fleeing felon, and posed a danger to the community. The U.D.A.A.charge is a felony. Second, he knew the Plaintiff had plead guilty recently to a charge of felonious assault which had been plea bargained from assault with intent to commit murder. This charge resulted from Terrance Jackson stabbing his stepfather with a knife at their Inkster home. Thirdly, he knew that an employee of the 7-11 Store where Plaintiff stole the car which resulted in the U.D.A.A. charge was fearful of the Plaintiff returning and either threatening her or injuring her. Fourth, he knew that beyond the corn field there were homes and farms that were in a rural area, and he believed that the Plaintiff may pose a danger to those people in the area. Fifth, he believed that the Plaintiff may pose a danger to passing motorists, since he might attempt to hitchhike from the area. Sixth, he knew that he was acting in accordance with Michigan law which allowed the use of deadly force against a fleeing felon. Seventh, he believed that if he allowed the prisoner to escape, he could be subject

to penalties pursuant to MCL 750.198. Eighth, that Detective Burton believed that if he did not shoot, the Plaintiff would have escaped.

/s/ FRANK G. BECKER
Attorney for Plaintiffs

/s/ DEAN KOULOURAS
Attorney for Defendants